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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-487

JOSEPH S. SEAMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

JOSEPH S. SEAMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the Superior Court of the State of New Jersey, Appellate Division.

The petitioner respectfully prays that a Writ of Certiorari issue to review the final order of the Supreme Court of the State of New Jersey entered herein on July 7, 1971, denying certification.

Opinion Below

The Order of the Supreme Court of the State of New Jersey denying certification was without opinion and is printed in 58 N. J. 594, 279 A. 2d 679. The Opinion of

the Appellate Division of the Superior Court of New Jersey affirming the judgment of conviction is printed in 114 N. J. Super. 19, 274 A. 2d 810, and is reprinted as Appendix A at page 1a herein.

Jurisdiction

The final order of the Supreme Court of the State of New Jersey was made and entered on July 7, 1971, and is appended here to *infra* at page 15a. The jurisdiction of this court is invoked under the provisions of Title 28: U. S. Code, Section 1257 (3).

Questions Presented

1. Whether the rights of the petitioner, under the confrontation clause of the 6th amendment of the Constitution, were abridged when the State placed before the jury hearsay statements of an alleged co-conspirator where the co-conspirator was, while available, not called by the State to testify.

2. Whether petitioners rights under the confrontation clause of the 6th amendment of the constitution were abridged when the State was permitted to play records of hearsay statements of an alleged co-conspirator where the co-conspirator was, while available, not called by the State to testify.

3. Whether the wholesale admission of hearsay statements attributed to an alleged co-conspirator, including tape recordings of such statements, constituting the most important evidence produced by the prosecution, abridged the petitioners' right to confrontation.

Constitutional Provisions Involved

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statement of the Case

The petitioner, Joseph J. Seaman, was indicted by a grand jury in the State of New Jersey in December of 1968, in four separate indictments charging misconduct in office, extortion, bribery and conspiracy. Seaman, a public officer appointed by the Governor of the State as secretary and a member of the State Board of Certified Public Accountants, was charged essentially with accepting unlawful fees or rewards in connection with his official duties. The indictments joined a codefendant, one Stanley Broskie who was later allowed to plead guilty to one count and was fined $1,000.00. The indictments against Seaman were moved in September of 1969 in the Superior Court of New Jersey, and at the time of the trial all charges against Broskie were severed and Seaman was tried alone. The trial resulted in a verdict of guilty on the extortion, misconduct and conspiracy charges, and Seaman was sentenced to imprisonment for a period of one to three years in the State prison and a fine of $5,000.00. An appeal was taken to the Appellate Division of the Superior Court of New Jersey, and in March of 1971,

the judgment was affirmed. A Petition for Certification was submitted to the Supreme Court of the State of New Jersey, which petition was denied on July 7, 1971. Immediately after the denial of the Petition for Certification, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the District of New Jersey. Said petition was denied, and the District Court refused to certify probable cause for appeal. A motion was made in the United States Court of Appeals for the Third Circuit for a Certificate of Probable Cause which motion was denied in August of 1971.

The principal ground for appeal was that Seaman's right to be confronted by the witnesses against him was abridged by the extensive use of hearsay statements of the codefendant Broskie and also by the use of tape recordings of several hearsay statements of Broskie. It should be noted that at the time of the trial of Seaman, Broskie's case had been severed. He had been allowed to plead to one count of conspiracy and was sentenced to pay a fine of $1,000.00. At the time of the trial several indictments remained open against him; and the State was in possession of a long sworn statement made by Broskie, which among other things, incriminated the Petitioner, Seaman. There is no dispute that Broskie was available to the State as a witness, but he was never called.

The hearsay statements were received in evidence through the testimony of various alleged coconspirators and admission was allowed under the provisions of a Rule of Evidence (63(9)) of New Jersey.

The Petitioner preserved the question for appeal by raising objections at the time the testimony was offered, by moving for a mistrial at the end of the case and by urging it at each stage of the proceeding.

The Petitioner is presently serving his custodial sentence at the New Jersey State Prison, Trenton, New Jersey.

Reasons for Granting Writ

The questions presented by this case represent a serious area of conffict in the law. On one side is a constitutional guarantee, at a trial, of the fundamenal right of an accused to confront the witnesses against him. On the other side is a rule of evidence which creates an exception to the prohibitions of the hearsay rule. In addition, this case involves a question of fundamental fairness in the prosecution of a criminal case. In toto, these proceedings call for a clear determination by this Court of where the line can be drawn between the right to confrontation and admission of out-of-court statements of alleged accomplices.

This case represents a most flagrant abuse of an exception to the Hearsay rule. In the State of New Jersey the so called co-conspirators declarations exception is set forth in the rule of evidence which provides in part as follows:

> "A statement which would be admissible if made by the declarant at the hearing is admissible against a party if . . . (b) at the time the statement was made the party and the declarant were participating in a plan to commit a crime . . . and the statement was made in furtherance of that plan." Rule 63 (9).

Under the provisions of that rule the prosecution offered the testimony of various persons as to alleged out-of-court statements made by Stanley Broskie also an alleged co-conspirator. In addition, the trial judge per-

mitted the State to supplement the in-court testimony of one of the co-conspirator witnesses with recordings of telephone conversations between the witness and Stanley Broskie. The telephone conversations and the other statements attributed to Broskie were most damaging to the position of the Petitioner and supplied nearly all of the evidence of a criminal scheme which was produced by the prosecutor. Prior to the trial, Broskie had been severed from the case, was permitted to plead guilty to one charge and was fined $1,000.00. He had given a statement under oath to the prosecutor which implicated the Petitioner and was available to subpoena by the State during the course of the trial. He was never called though he was obviously available and the State was satisfied to utilize the evidence of the extra-judicial statements as a means of supplying the testimony which might have come from the lips of Broskie. This was the safest course for the State since its effect was to deny to the Petitioner the opportunity to demonstrate by way of effective cross-examination that the declarations of Broskie were fabrications made by him for his own purposes. In *Pointer* v. *Texas,* 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965), it was held that,

> "The Sixth Amendment's right of an accused to confront the witness against him is, . . . a fundamental right and is made obligatory on the States by the 14th Amendment."

Since that case it has been held in the case of *Barber* v. *Page,* 390 U. S. 719, 20 L. Ed. 255, 88 S. Ct. 1318 (1968), that cross-examination at a prior hearing involving the same parties and the same issues does not satisfy the confrontation rights where the witness is available to be called at the trial. In the same case it was further held that not only does the right to confrontation include the

opportunity to cross-examine but it also provides the occasion for the jury to weigh the demeanor of the witness. Of course, in the trial of this case the Petitioner was able to cross-examine all of the witnesses actually called to testify including the alleged co-conspirator who testified as to the statements made by Broskie, however, as in the case of *Douglas* v. *Alabama,* 380 U. S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965), the cross-examination of those witnesses could not substitute for the cross-examination of the declarant in order to test the truth of the out-of-court statements. In this case, of course, unlike *Douglas* v. *Alabama, supra,* and unlike *Dutton* v. *Evans,* 400 U. S. 74, 27 L. Ed. 2d 213, 91 S. Ct. (1970), the fact situation involves extra-judicial statements allegedly made in the course of a criminal conspiracy. In other words the evidence would conform to the so called "federal conspiracy rule" wherein the out-of-court statement of one conspirator is admissible if made in the course of and in furtherance of the conspiracy but not during a subsequent period. *Lutwak* v. *United States,* 344 U. S. 604, 97 L. Ed. 593, 73 S. Ct. 481 (1952); *Krulewich* v. *United States,* 336 U. S. 440, 93 L. Ed. 790, 69 S. Ct. 716 (1949). Here, however, we have a situation wherein that rule was enforced to an extreme and with a result which could hardly have been intended by those who formulated the rule. By utilization of the rule, the State was able to present evidence consistent with its theory of the guilt of the Petitioner without the embarrassment of putting the credibility of that evidence to the test. It is the contention of the Petitioner that this is a case which presents all of the unanswered questions as posed by Mr. Justice Marshall in his dissenting opinion. *Dutton* v. *Evans, supra,* as the Justice said in that case that the confrontation of witnesses through cross-examination is meant to aid in answering questions as to what the de-

clarant said, what the declarant meant and whether or not it was the truth. In this case, if Broskie had testified and had been cross-examined, the Petitioner could have fully explored those areas, and then the jury would have been in a position to evaluate all of the statements and declarations of Broskie in the light of his testimony and demeanor.

CONCLUSION

The Petitioner was deprived of a fair trial by reason of the denial of confrontation with the principal witness against him. The Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—March 9, 1971.)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-728-69

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH J. SEAMAN,

Defendant-Appellant.

Argued February 1, 1971—Decided March 9, 1971.

Before Judges GOLDMANN, LEONARD and MOUNTAIN.

On appeal from Essex County Court, Law Division.

Mr. Walter D. VanRiper argued the cause for appellant (*Messrs. VanRiper, Belmont & Villanueva,* attorneys; *Mr. Frederic C. Ritger, Jr.,* on the brief).

Mr. David S. Baime, Assistant Prosecutor, argued the cause for respondent (*Mr. Joseph P. Lordi,* Essex County Prosecutor, attorney).

Opinion of the Superior Court of New Jersey, Appellate Division

The opinion of the court was delivered by

LEONARD, J.A.D.

The Essex County grand jury returned four indictments against defendant charging him with the following: (1) No. 863—five counts of misconduct in office (N.J.S.A. 2A:85-1); (2) No. 864—conspiracy with one Stanley Broskie to violate the statutes prohibiting misconduct in office and extortion (N.J.S.A. 2A:98-1); (3) No. 865—five counts of bribery (N.J.S.A. 2A:85-1) and (4) No. 866—five counts of extortion (N.J.S.A. 2A:105-1).

Following a jury trial defendant was convicted of all offenses except the bribery charge which was dismissed by the court at the end of the State's case. Defendant received a total sentence of 1-3 years in State Prison and a fine of $5000.

Defendant, a certified public accountant since 1928 and an attorney since 1934, was appointed in 1937 to the State Board of Certified Public Accountants (State Board). He became its secretary in 1938 and served in that position until 1968.

The State Board was responsible for preparing, administering and grading the C.P.A. examinations. See N.J.S.A. 45:2A-1 *et seq.* Although the American Institute of Certified Public Accountants actually prepared the examinations and preliminarily graded the papers, its marks were purely advisory, final responsibility for grades resting with the State Board. N.J.S.A. 45:2A-7. The grades determined by the Institute usually were accepted in the first instance by the State Board and it notified candidates that they passed or failed. However, the

grades of a number of those who failed would be reviewed by the State Board and in some cases the Institute grades were changed. The authority for reviewing and regrading these papers was delegated to defendant, he having exclusive jurisdiction and discretion in this respect.

The present charges stem from defendant's alleged improper conduct with regard to his regrading of the examination papers of Francis Cerny, Robert Pacca, George VanHook, Sol Glick, Sidney Stern and Gerrold Berr. Each of these individuals had been students in a cram or review course conducted by Stanley Broskie, a C.P.A. with offices in East Orange, New Jersey. Likewise, each had failed all or parts of the C.P.A. examination. (The examination consisted of four sections: Law, auditing, theory and problems.)

The State contended that each of the named candidates was approached by Broskie who told them that their papers would be regraded if they would pay him a certain sum of money and take an additional sum to defendant at his office. They were to talk to defendant generally about accounting, the examination and their personal situation, then hand him an envelope, usually containing $1000 in small bills. This money was to be for either "his favorite charity" or the Joseph J. Seaman Scholarship Fund, the latter being a fund which defendant had begun (but did not administer) with the proceeds of a testimonial dinner previously given in his honor by the New Jersey Society of C.P.A.'s. No receipts were ever issued for these "contributions."

Incidentally, Broskie was indicted on the conspiracy, bribery and extortion charges along with defendant, but

pleaded guilty to the conspiracy charge before defendant's trial began and fined $1000. The other charges were held open.

Robert Pacca (listed as a co-conspirator on the conspiracy indictment, but not included as a defendant) testified that he had taken the C.P.A. examination on several occasions from November 1963 to May 1967 but never passed any of the four portions. After taking Broskie's cram course, Pacca took the November 1967 examination. Before the grades were officially announced, Broskie called Pacca to tell him he had passed two parts. Pacca then went to see Broskie, and Broskie told him he "could get [him] passed" on the other portions of the examination if Pacca were willing to "make a contribution to the scolarship fund" at a total cost of $1500. Pacca agreed to the scheme about ten days later. Approximately one month thereafter Pacca received a letter from the State Board saying he had passed all four parts of the examination. A week later, at Broskie's direction, he brought Broskie an envelope with $500 in cash and then made an appointment to see Seaman, went to his office in Perth Amboy and left $1000 in small bills on his desk. Seaman did not open the envelope in Pacca's presence, give him a receipt, or sent a letter of acknowledgment, as he promised he would. Pacca did not deduct the $1000 as a contribution to charity on his income tax return.

On cross-examination Pacca admitted he knew the State Board had the right to regrade the examination papers. He also said that he asked Broskie if he could pay him by check, but Broskie emphasized he should bring cash.

Similar testimony was adduced as to Francis Cerny, George VanHook, Gerrold Berr and Sol Glick, four other

co-conspirators listed in the conspiracy indictment, and as to Sidney Stern, all five previously unsuccessful examination candidates. Cerny testified that he had originally brought Broskie envelopes with blank checks. Broskie said they were unacceptable so Cerny cashed the checks and gave both Broskie and Seaman cash in envelopes. VanHook said that when he went to Seaman he gave him the envelope, saying "I want to contribute the money to the scholarship fund." Berr said Broskie told him, "It will cost you two big ones." Glick told Seaman the money was "for [his] favorite charity." Stern said Seaman picked up his envelope and began, on his own, telling Stern about the laudable aims of the scholarship fund. None of these men was given a receipt for his contribution and none took the contribution as a deduction on his income tax return.

John Kortbawi, an agent for Internal Revenue Service, testified that after he had taken the fourth part of the examination—he had earlied passed the first three parts—he received a letter from Broskie requesting an appointment. When Kortbawi got to Broskie's office, Broskie told him he "didn't quite make it." Kortbawi told Broskie he was an I.R.S. agent, to which Broskie replied, "Wow, you're hot stuff. If I had known that, I wouldn't have called you." However, after ascertaining that Kortbawi did want to become certified, Broskie said, "If I'm going to give you something that you are going to have to pay for, you are going to have to get something back in exchange for it. • • • [Y]ou're a big boy. You know what the score is in this world." He then told Kortbawi that he would have to make a contribution to the fund in order to pass. Kortbawi testified that Broskie said of Seaman, "As inde-

pendently wealthy and rich as this man is, he still likes to get a little money on the side." Kortbawi said he reported the incident to a group supervisor and then had an electronic device attached to his telephone. Broskie and Kortbawi had several subsequent conversations pertaining to the amount of the "contribution" that had to be made, and Kortbawi's most recent failure on the examination, all of which were taped and played for the jury. In another conversation Broskie told Kortbawi that he "just got off the phone * * * with the big cheese," in reference to the notification that Kortbawi was soon to get that he passed the examination. Kortbawi said he had visited Seaman earlier to discuss the examination and that he told Seaman at that time he would consider it "an honor" to contribute to the scholarship fund. At that time Seaman indicated to Kortbawi that he did not want there to be any connection between a contribution and the examination.

Defendant took the stand on his own behalf and denied participating in any scheme with Broskie or having improperly accepted payments in his official capacity as Board secretary. He said he recommended Cerny and the others for certification because of the quality of their papers, not because of the contributions. He considered the monies as payments to the scholarship fund, totally unrelated to the regrading. However, he admitted that 22 of the 23 accountants who contributed to the fund had been regraded. Seaman said that on June 3, 1968 he sent a $10,000 check from his personal account to the scholarship fund; this contribution included the contributions made by the successful candidates, although their names were not mentioned in Seaman's letter of transmittal.

Opinion of the Superior Court of New Jersey, Appellate Division

In addition to a host of fact witnesses, defendant produced an impressive selection of prominent character witnesses.

Defendant first contends that the introduction into evidence of tapes of the various Broskie-Kortbawi conversations was prejudicial error because this procedure denied him the constitutional right of confrontation under the Sixth and Fourteenth Amendments. He asserts that all of Broskie's statements on the tape were made out of defendant's presence and were intended to involve defendant, without his knowledge.

Although the United States Supreme Court has recognized that the Sixth Amendment's right of an accused to confront the witness against him is a fundamental right made obligatory on the States by the Fourteenth Amendment, the court, nevertheless, in *Dutton* v. *Evans*, —— U.S. ——, 27 L. Ed. 2d 213 (1970), held:

> It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced.
>
> • • •
>
> "• • • The issue before us is the considerably narrower one of whether a defendant's constitutional right "to be confronted with the witnesses against him" is necessarily inconsistent with a State's decision to change its hearsay rules . . . While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Con-

> frontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; • • •.'
>
> • • •
>
> It seems apparent that the Sixth Amendment's confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now. [at 222-226]

See also *California* v. *Green*, 399 U. S. ——, 26 L. Ed. 2d 489 (1970).

In this State, *Evidence Rule* 63(9) provides that

> A statement which would be admissible if made by the declarant at the hearing is admissible against a party if • • • (b) at the time the statement was made the party and the declarant were participating in a plan to commit a crime of civil wrong and the statement was made in furtherance of that plan.

In *State* v. *Boiardo*, 111 N.J. Super. 219 (App. Div. 1970), certif. den. 57 N.J. 130 (1970), we declined to hold that the "Confrontation Clause invalidates the above-quoted evidence rule." [at 230]. We concluded that the "introduction in evidence of hearsay statements made by co-defendants in furtherance of a conspiracy in which [defendant] was a participant did not violate his Sixth Amendment right to be confronted by witnesses against him." *Ibid.* These declarations of a conspirator constitute

an exception to the hearsay rule, affording in the circumstances a sufficient guarantee of testimonial trustwothiness. *State* v. *Carbone,* 10 N.J. 329, 341 (1952).

Defendant's assertion that the State failed to prove a *prima facie* case of conspiracy prior to the admission of the tapes is without merit. In such a situation the threshhold requirement for admissibility is satisfied by showing the likelihood of an illicit association between the declarant and defendant. *United States* v. *Ragland,* 375 F. 2d 471, 477 (2 Cir. 1967), *cert.* den. 390 U.S. 925 (1968). Prior to the introduction of the tapes, Pacca, Cerny and the others all testified to the "likelihood" of such an illicit agreement.

Defendant further argues that the very use of the tapes was prejudicial, in that the memorialization on tape of certain testimony tends to highlight it and emphasize it most vividly in the jurors' minds. The use of sound recordings is not inherently prejudicial. *State* v. *Driver,* 38 N.J. 255, 287-288 (1962).

Finally, defendant claims that although the recordings might have been evidentially competent as to the conspiracy charge, they played no part in the misconduct and extortion charges and their use was therefore confusing to the jury and prejudicial. There is no basis to this claim. The trial judge in his charge specifically and clearly told the jury that the Broskie tapes could not be considered in relation to the other offenses (besides conspiracy). A similar argument was raised and rejected in *State* v. *Dennis,* 43 N.J. 418, 424 (1964).

Based upon all of the above, we conclude that the Broskie-Kortbawi tapes were properly received in evi-

dence and defendant was neither prejudiced nor otherwise thereby denied a fair trial.

Defendant next contends that the trial court committed error in failing to instruct the jury that they could draw an inference adverse to the State from its failure to produce Broskie.

Such an adverse inference is not proper if the witness was available to both parties or "by his position would be likely to be so prejudicial against the party that the latter could not be expected to obtain the unbiased truth from him." *State* v. *Clawans*, 38 N.J. 162, 171 (1962); see also *Wild* v. *Roman*, 91 N.J. Super. 410, 414 (App. Div. 1966). Broskie was not in custody at the time and his whereabouts was equally known to defendant as well as by the State. Thus, he was available to both parties. Further, the record clearly indicates that even though Broskie originally promised the State that he would be helpful in the prosecution of defendant, thereafter, and before trial, he expressly stated to the prosecutor and his own counsel that he was "hostile to the State" and that he "wants to help the defendant in any way that he can." At the time defendant moved for a *Clawans* charge, the trial court gave defendant an opportunity to reopen his case and call Broskie as a defense witness but this offer was refused. Under all these circumstances, the judge correctly refused to gave a *Clawans* charge.

Defendant's next contention is that his motion for judgment of acquittal on the conspiracy charge, made at the conclusion of the State's case, should have been granted because there was insufficient evidence of a conspiracy independent of hearsay declarations of the alleged accomplice. We find there was.

A conspiracy may be proved either by direct or circumstantial evidence. *State* v. *Carbone, supra,* 10 N.J. at 341. Proof of the existence thereof is generally a matter of inference deducted from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between or among them. *Ibid.* "The prosecutor is permitted to bring in ambiguous and somewhat unrelated acts, statements, conversations and transactions in the hope that when viewed as a whole, the inference of a pre-planned scheme will emerge. In short, when the total effect of the proof indicates sufficiently the existence of a conspiracy, the case must go to the jury." *State* v. *General,* 42 N.J. 366, 376 (1964).

We believe the trial court properly denied this motion. Considering the State's evidence in its entirety and giving the State the benefit of all its favorable testimony as well as all the inferences that could reasonably be drawn therefrom, we conclude that the jury could find defendant's guilt of the crime beyond a reasonable doubt. *State* v. *Reyes,* 50 N.J. 454, 458-459 (1967). As we have previously indicated, the testimony of witnesses, independent of the tapes, established defendant's direct role in the conspiracy. Among other factors, it was not contradicted that he accepted envelopes from each containing small bills without counting them, immediately after regrading their examinations.

Defendant also maintains that the conspiracy indictment fails to charge a crime, since the offense can only be committed by the concerted action of the parties to it. He bottoms his position upon the so-called Wharton rule of conspiracy. That rule as originally formulated stated that

> When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a nature that it is aggravated by a plurality of agents cannot be maintained. [2 *Wharton, Criminal Law* (12th ed. 1932), §1604 at 1862. See also. 1 *Wharton, Criminal Law and Procedure* (Anderson ed. 1957), §89 at 191]

Although the existence of this general rule was recognized in *State* v. *Lennon*, 4 N.J. Super. 415, 419 (App. Div. 1949), we noted [at 420], "[W]here a crime from a legal standpoint may be committed by one person only, a conspiracy between two or more persons to commit that offense changes the character of the offense and the stated rule does not apply." The Supreme Court affirmed in 3 N.J. 337 (1949) and said:

> • • • the conspiracy is also criminal where it contemplated the co-operation of a greater number of parties than were necessary to the commission of the principal offense. Here the conspiracy [to commit bookmaking] charged and proved included participants who were not indispensable to the consummation of the substantive offense. This is the distinguishing principle • • •. [at 343]

In the instant case the conspiracy indictment charged defendant with conspiring to violate the common law offense of misconduct in office (N.J.S.A. 2A:85-1) and the statutory offense of extortion (N.J.S.A. 2A:105-1).

The crime of misconduct in office is defined to be corrupt misbehavior by an officer in the exercise of the duties

of his office or while acting under the color of his office. *State* v. *Begyn,* 34 N.J. 35, 49 (1961); *State* v. *Silverstein,* 76 N.J. Super. 536, 540 (App. Div. 1962), aff'd 41 N.J. 203 (1963). Having by color of his office received money to which he was not legally entitled by reason of or in connection with his legal duties, defendant was guilty of the crime of extortion under our statute. *State* v. *Begyn, supra,* at 47. There is a distinction between that crime and bribery; the latter offense consists in *offering* a present or *receiving* one, while the former consists in *demanding* an illegal fee or present by color of office. 31 *Am. Jur.* 2d, §2, p. 902. See *State* v. *Begyn, supra,* at 45-48. The purpose of our extortion statute was simply to punish the officer who illegally took the fee. *Id.* at 46. In bribery both the officer and the recipient are guilty of the offense. *Id.* at 48.

The substantive crimes of misconduct in office and extortion set forth in the conspiracy indictment could be and were committed by defendant alone when he received money which he was not officially entitled to and then corruptly regraded examination papers. Furthermore, Broskie and the others were not indispensable to the commission of misconduct in office and all of them were not indispensable to the extortion. Therefore, we hold the so-called Wharton rule to be inapplicable. See *United States* v. *Smolin,* 182 F. 2d 782, 786 (2 Cir. 1950); *United States* v. *Corallo,* 281 F. Supp. 24, 29 (S.D.N.Y. 1968); *United States* v. *Cogan,* 266 F. Supp. 374 (S.D.N.Y. 1967).

Finally, defendant asserts that the indictment charging the offense of misconduct in office, alleged to have happened in Middlesex County, was improperly and unlaw-

fully returned by the Essex County grand jury, and placing defendant on trial thereon in the latter county was illegal and prejudicial to his constitutional rights. This point is utterly without merit. Venue is not jurisdictional, it is merely a matter of practice and procedure, as long as it appears the offense was committed within the State. *State* v. *DiPaolo,* 34 N. J. 279, 287-288 (1961); *State* v. *Greco,* 29 N.J. 94, 104 (1959). Hence, a question of venue does not implicate the jurisdiction of a grand jury. *In re Salvi,* 34 N.J. 450, 451 (1961). Further, a claim of improper venue must be raised by pretrial motion or else is considered waived. *State* v. *DiPaolo, supra,* at 288; *State* v. *Greco, supra,* at 105; *State* v. *Schultheis,* 113 N.J. Super. 11, 19 (App. Div. 1971).

Additionally, although the indictment alleges only offenses in Middlesex County, it appears that the solicitation of the offenses was committed by an aider and abettor in Essex County, Broskie's office being in East Orange. In no event do we find that defendant suffered prejudice by the Essex County indictment and trial.

Judgment affirmed.

APPENDIX B

On Petition for Certification

SUPREME COURT OF NEW JERSEY

C-499 SEPTEMBER TERM 1970

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

JOSEPH J. SEAMAN,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 7th day of July, 1971.

IRVING B. ZUCKNER
Acting Clerk of the Supreme Court

True Copy

IRVING B. ZUCKNER
Acting Clerk

Filed
July 7, 1971
ILLEGIBLE
Clerk